

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

KENNETH MAURICE GRANT,

Case No. 3:16-cv-00104-MMD-VPC

Petitioner,

ORDER

v.

QUENTIN BYRNE, *et al.*,

Respondents.

On April 17, 2017, respondents filed a motion to dismiss petitioner Grant's petition for writ of habeas corpus. (ECF No. 19.) Also pending before the Court are petitioner's renewed motion for appointment of counsel (ECF No. 29), motion to expedite the hearing on the motion (ECF No. 30), motion to extend the time within which petitioner is required to respond to respondents' motion to dismiss (ECF No. 31), and motion to strike (ECF No. 34).

As grounds for their motion to dismiss, respondents argue that all of petitioner's claims allege ineffectiveness of state post-conviction counsel and, as such, are not cognizable grounds for federal habeas relief. Respondents also argue that all of the claims are unexhausted—i.e., have not been presented to the Nevada Supreme Court.

While respondents are correct that ineffective assistance of state post-conviction counsel is not a ground for federal habeas relief (See 28 U.S.C. § 2254(i)), this Court does not agree that petitioner's claims are premised on that theory. In Grounds One through Ten, petitioner alleges a violation of his rights under the Sixth and Fourteenth Amendments followed by factual allegations involving the performance of petitioner's pre-

1 trial, trial, and/or appellate counsel. However, petitioner included the following handwritten
2 phrase at the beginning of the factual allegations for each claim: “That post-conviction
3 counsel was ineffective for failing to bring.” While misguided, the inclusion of this phrase
4 should not result in the dismissal of the petition. See *Hebbe v. Pliler*, 627 F.3d 338, 342
5 (9th Cir.2010) (holding that pro se pleadings “must be held to less stringent standards
6 than formal pleadings drafted by lawyers”). Consequently, Grounds One through Ten are
7 cognizable as federal habeas claims.¹

8 That being said, respondents’ motion to dismiss demonstrates that most of
9 petitioner’s claims are unexhausted. In addition, it is clear at this point that no state
10 remedies are currently available to petitioner. That is, if petitioner were to return to state
11 court and present his federal habeas claims, the state courts would find the claims
12 procedurally barred as untimely and successive.² “An unexhausted claim will be
13 procedurally defaulted, if state procedural rules would now bar the petitioner from bringing
14 the claim in state court.” *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014). Thus, even
15 if not exhausted in the conventional sense, petitioner’s claims are technically exhausted
16 and procedurally defaulted.

17 Given the potential complexity involved in resolving procedural issues in this case,
18 the Court finds that the interests of justice warrant the appointment of counsel to represent
19 the petitioner. See 18 U.S.C. §3006A(a)(2)(B). Therefore, the Court will deny
20 respondents’ motion to dismiss without prejudice and grant petitioner’s renewed motion
21 for appointment of counsel.

22 ¹Petitioner also included two additional “grounds” for relief in his petition. Ground
23 Eleven is, for the most part, a copy of petitioner’s state district court habeas petition, which
24 is not the correct method for pleading a habeas claim. See Rule 2(d) of Rules Governing
25 Habeas Corpus Cases Under Section 2254. Ground Twelve alleges ineffective
assistance of state post-conviction counsel, which must be dismissed under 28 U.S.C.
2254(i).

26 ²Pursuant to Nev. Rev. Stat. § 34.726(1), a petition that challenges the validity of
27 a judgment or sentence must be filed within one year after entry of the judgment of
28 conviction or within one year after the appellate court issues its remittitur unless there is
good cause for the delay. Pursuant to Nev. Rev. Stat. § 34.810(2), (3), a judge must
dismiss a second or successive petition if the petition fails to demonstrate good cause for
the petitioner’s failure to present the claim in the original petition.

1 It is therefore ordered that petitioner's renewed motion for appointment of counsel
2 (ECF No. 29) is granted. The Federal Public Defender for the District of Nevada (FPD) is
3 appointed to represent petitioner. If the FPD is unable to represent the petitioner, due to
4 a conflict of interest or other reason, then alternate counsel will be appointed. In either
5 case, counsel will represent the petitioner in all federal-court proceedings relating to this
6 matter, unless allowed to withdraw.

7 It is further ordered that the Clerk of the Court electronically serve upon the FPD a
8 copy of this order, together with a copy of the petition for writ of habeas corpus.

9 It is further ordered that the FPD will have twenty (20) days from the date of entry
10 of this order to file a notice of appearance, or to indicate to the Court its inability to
11 represent the petitioner in this case.

12 It is further ordered that the Court will establish a schedule for further proceedings
13 after counsel appears for the petitioner.

14 It is further ordered that respondents' motion to dismiss (ECF No. 19) is denied
15 without prejudice.

16 It is further ordered that petitioner's motion to expedite the hearing (ECF No. 30),
17 motion to extend the time within which petitioner is required to respond to respondents'
18 motion to dismiss (ECF No. 31), and motion to strike (ECF No. 34) are denied as moot.

19 DATED THIS 1st day of November 2017.

20
21 

22 MIRANDA M. DU
23 UNITED STATES DISTRICT JUDGE
24
25
26
27
28